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IN THE

Supreme Court of the United States

October Term, 1938

No. 222

THE WASHINGTONIAN PUBLISHING COMPANY, INC.,
Petitioner,

v.

DREW PEARSON, ROBERT S. ALLEN and VAN REES PRESS, INC.,
Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

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December 9, 1938.

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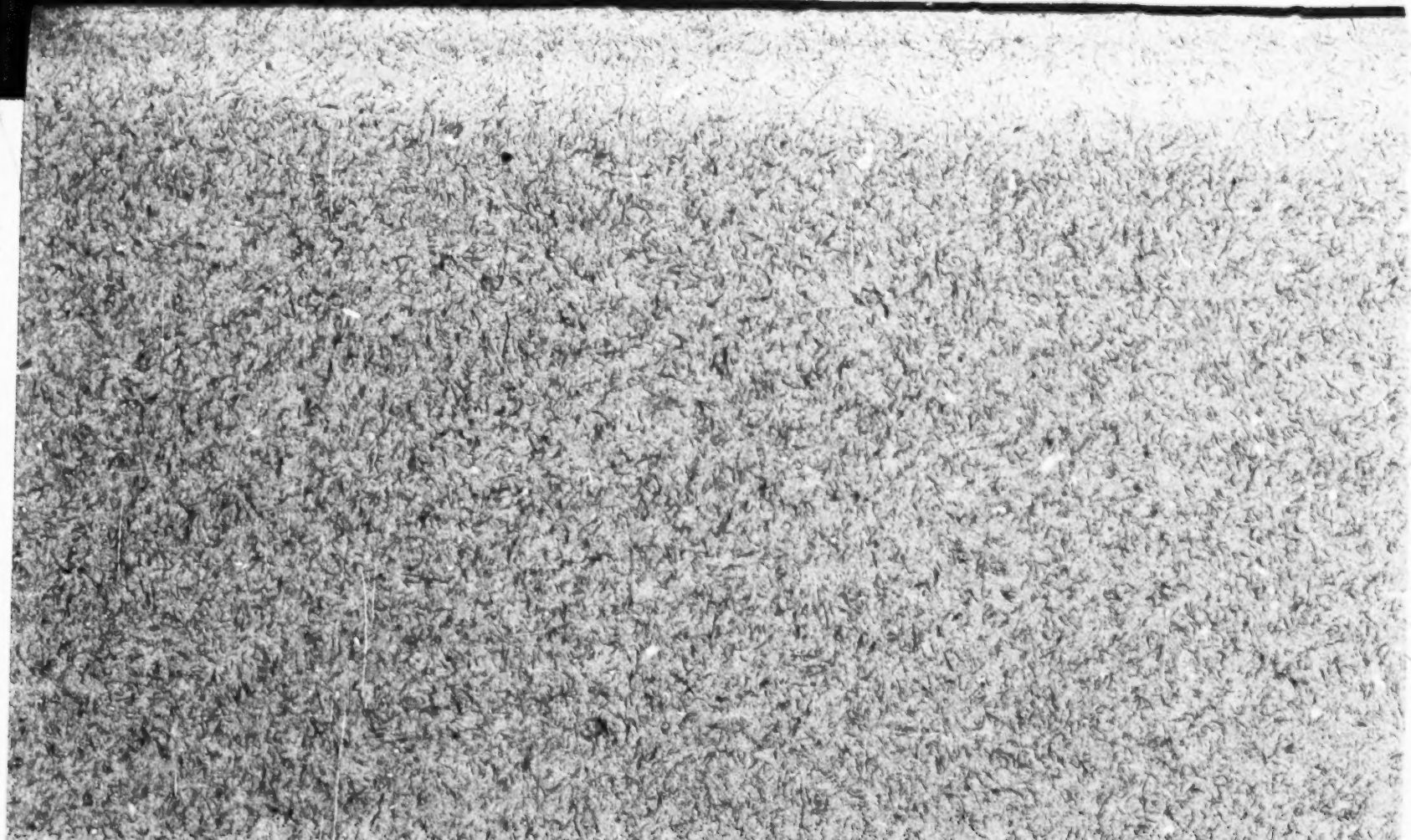

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Copyright Act of 1909:

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RESPONDENTS' SUPPLEMENTAL BRIEF

This brief is filed pursuant to leave granted by the Court during oral argument of the cause.

I

Respondents contend that registration must be obtained at the same time that copies are deposited.

On page 7 of their reply brief, counsel for petitioner state that "The principal error in this new position of the respondents is that the copyright law *does not require registration* at any time during the life of the copyright." This is not true. The copyright law *does require registration,* and requires it at the same time as the deposit of copies. Counsel's conclusion is apparently the result of the error

manifested in the following statement also appearing on page 7 of their reply brief:

> "In this connection, the assertion in note 3, page 7, of the respondents' brief, that a 'claim of copyright is an application for registration' and 'not the notice of copyright,' is incorrect. A reading of Section 12 as a whole, from which section the respondents quote in part (Respdts' Brief, p. 7) discloses that the phrase 'claim of copyright,' as used therein, clearly refers to the notice of claim of copyright appearing on the publication."

The correctness of respondents' assertion that a "claim of copyright" is an application for registration is readily seen from an examination of Sections 11 and 12. Section 11 provides for copyright of *unpublished* works "by the deposit, *with claim of copyright*, of one complete copy of such work if it be a lecture or similar production, or a dramatic, musical, or dramatico-musical composition", etc. (Various other evidences of the work are required in other cases.) The important point, for this discussion, is that *no notice of copyright is required.* The copyright and the right to sue for infringement thereof are created at one and the same time, whereas, in the case of a *published* work, copyright is first secured under Section 9 by publication with notice of copyright, and then the right to sue is established by depositing copies under Section 12, *accompanied by a claim of copyright.* As a matter of fact, Section 12 reaffirms the requirement of Section 11 as to unpublished works at the same time that it requires the deposit of "two complete copies" of a published work, the language of the Section being:

> ". . . or if the work is not reproduced in copies for sale, there shall be deposited the copy, print, photograph, or other identifying reproduction *provided by section 11* of this Act, such copies or copy, print, photograph, or other reproduction *to be accompanied in each*

case by a claim of copyright. . . ." (Emphasis supplied.)

The phrase "claim of copyright" is used in connection with the deposit in each case, although where the work is not reproduced in copies for sale there is no notice of copyright. Therefore, it cannot possibly refer to such notice, as petitioner contends.

The Copyright Office, in its Rules and Regulations, has recognized this inevitable meaning of a "claim of copyright" as used in Sections 11 and 12. Rule 22 (17 U. S. C. A. following Sec. 53, pp. 180, 183) contains the following statement in connection with unpublished works:

> "In each case the deposited article must be accompanied by *a claim of copyright* (*an application for registration*) and a money order for the amount of the statutory fee." (Emphasis supplied.)

Rule 23 provides that—

> "Any work which has been registered under Section 11, if published, i. e., reproduced in copies for sale or distribution, must be deposited a second time (*accompanied by an application for registration* and the statutory fee) in the same manner as is required in the case of works published in the first place." (Emphasis supplied.)

Rule 24 states:

> "Promptly after first publication of the work with the copyright notice inscribed, two complete copies of the best edition of the work then published must be sent to the Copyright Office, *with a proper application for registration* correctly filled out and a money order for the amount of the legal fee." (Emphasis supplied.)

Further evidence of the correctness of respondents' assertion that the "claim of copyright" which must accom-

pany every deposit is an application for registration is found in Sections 54 and 55. Section 54 requires the Register of Copyrights, whenever a copy of a work has been deposited, to "*make entry thereof*" in "such record books in the Copyright Office as are required to carry out the provisions of this Act". This is only possible if the deposit be accompanied, as required both by Section 11 and Section 12, by a "claim of copyright" in the form of an application for registration, because Section 55 provides that "in the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration" containing various facts which could not possibly be secured from an examination of the copy deposited, such as the address of the claimant, the nationality of the author, date of publication if the work has been reproduced for sale, the fact, in the case of a book, of the receipt of the affidavit as to American manufacture, and the date of completion of printing or the date of the publication.

Registration is thus seen to be definitely associated with deposit of copies and, as will hereafter more fully appear, is of primary importance to effectuate the purposes of the Copyright Act.

II

Respondents agree that the Copyright Act should be construed so as to give effect to all of its provisions.

Counsel for petitioner devote the first four pages of their reply brief to the construction of the Copyright Act and stress the necessity for considering and giving effect to all of the sections. They also contend (Supp. Brief, pp. 17-18, Reply Brief, p. 6) that publication with notice of copyright bestowed upon the petitioner the exclusive right to use and publish the work for a period of 28 years. However, no mention is made of the very first section of the Copyright Act stating who shall have the *exclusive* privilege to print,

publish, vend, and do the other things enumerated. That section states:

> "Any person entitled thereto, *upon complying with the provisions of this Act,* shall have the exclusive right:". (Emphasis supplied.)

It is thus apparent that *all* of the provisions of the Act are important.

In the present case all that the petitioner had done at the time of the infringement, and for six months thereafter, was publish with notice of copyright. But that was only one of the requirements. In order to secure the exclusive right of publication—a right which, as petitioner states, could only be enjoyed if accompanied by the right to sue, it was necessary, under Section 1 and the established law on the subject, to comply with all of the provisions. Two remained, namely, deposit of copies and registration. According to Section 12, there existed no right whatsoever to sue until those requirements were met.

Attention has already been called to Sections 54 and 55 with the requirement of "entry" of copyright and the data to be secured from such entry and included in a certificate of registration. There then follows Section 56 with the requirement—

> "That the register of copyrights shall fully index all copyright registrations and assignments and *shall print at periodic intervals a catalogue* of the titles of articles deposited and registered for copyright, together with suitable indexes, and *at stated intervals shall print complete and indexed catalogues for each class of copyright entries,* and may thereupon, if expedient, destroy the original manuscript catalogue cards containing the titles included in such printed volumes and representing the entries made during such intervals. The current catalogues of copyright entries and the index volumes herein provided for shall be admitted in any court as prima facie evidence of the facts stated therein as regards copyright registration." (Emphasis supplied.)

Section 57 provides for the distribution and public sale of the catalogues.

The entries in the record books of the Copyright Office, and the catalogues of such entries, are obviously intended to represent a complete list of copyrighted works. However, this purpose would not be accomplished under petitioner's contention that deposit and registration may take place *any* time prior to the institution of suit for infringement. Copies of *published* works, together with the application for registration and the statutory fee, would never be deposited unless an infringement occurred and suit was to be instituted, or unless a demand was made by the Register of Copyrights under Section 13, because very few persons would go to the trouble of depositing copies and to the expense of registration if it were not absolutely necessary in order to secure the exclusive right to print, publish, etc. This would mean a negligible number of deposits and registrations of *published* works because there are comparatively few suits for infringement and even fewer demands by the Register of Copyrights. The latter has no means of knowing when a deposit should be made except by actual examination of new publications to determine whether they carry a notice of copyright, or by advice from interested parties. That is obviously the reason Section 13 merely authorizes, and does not require, the Register to demand deposit.

The net result of such a situation would be that, with minor exceptions, only *un*published works would be deposited and registered. They would still come in because statutory copyright of such works can only be secured by deposit and registration under Section 11, there being no notice required as in the case of a published work under Section 9. But an official record, with the ensuing catalogue required by Section 56, would be of doubtful value if it were practically limited to *un*published works, and certainly it would not be the official registry of information to which the public is entitled under the Copyright Act. Thus, one of the main purposes of the Act would be defeated.

Such a situation would have still another effect. The Copyright Office, which is now self-supported * by the registration fees required by Section 61, would be deprived of a large amount of revenue which the Act contemplates it should receive from the persons who are the beneficiaries of the statutory privileges.

It is therefore apparent that petitioner's contention that deposit and registration may take place any time prior to the institution of suit not only fails to give effect to important sections of the statute but it would actually *encourage* non-compliance with the provisions applicable to published works unless and until an infringement occurs and suit is contemplated.

III

The interpretation of the prompt deposit requirement.

During the course of the argument, the Court manifested particular interest in the meaning of the word "promptly" in Section 12 and in the widely divergent contentions of the

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* The annual reports of the Register of Copyrights show that the Copyright Office has, since its organization in 1897, earned more in fees than it has expended. The last published annual report shows that the following fees were earned for the fiscal year ending June 30, 1937 (pp. 1-2):

Registration of	112,510	*published works* ($2 each)	$225,020.00
Registration of	31,874	unpublished works ($1 each)	31,874.00
Registration of	1,451	photographs without certificates ($1 each)	1,451.00
Registration of	8,589	renewals ($1 each)	8,589.00
Miscellaneous			13,607.40
Total registrations	154,424	*Total fees*	$280,541.40

For the same period the *total expenditures* were $251,748.47

It is to be noted that the registrations of *published* works numbered 112,510, or *more than 72% of the total registrations*, and that the same source produced $225,020 in fees, or *more than 80% of the total revenue.*

parties. The petitioner contends that the use of the word is meaningless except as to Section 13, wherein it is repeated. Obviously, if the Congress had not intended that it apply to the provisions of Section 12, it would not have used the word therein.

The contention upon which the respondents chiefly rely in connection with the word "promptly" is that such deposit, accompanied by registration, is necessary in order to enjoy full and complete protection of the copyright from the time it is secured and that, failing in this, any infringements which take place prior to tardy deposit and registration may not be the subject of suit. However, although this construction presents no difficulty insofar as the present case is concerned, it might well be a cause for argument if there were a contest as to whether a particular deposit had been made promptly. In order to obviate any such situation, it is suggested that the word "promptly" may well be construed as a warning that, inasmuch as there can be no exclusive right to make use of the copyrighted material, including the right to sue in the case of infringement thereof, until after full compliance with the statute, there must be a prompt deposit, accompanied by registration, in order to avoid an interval during which any infringement could not become the subject of suit. It is suggested that such an interpretation would work no hardship upon the diligent copyright proprietor but would operate to the detriment only of those who delay either through carelessness or through a desire to save the expense incident to registration.

IV

This case is unique.

Despite the several copyright cases cited by petitioner, as well as the one to which respondents refer, in connection with the prompt deposit requirement of Section 12, the instant case is actually *unique*. No other case involves the

question of *infringement before deposit of copies and registration,* regardless of whether the deposit is prompt or tardy. Therefore, the Court need only be concerned with its own copyright decisions, which unanimously hold that *all* of the conditions of the copyright law are important and must be performed, and that the rights of a copyright owner depend entirely upon whether he has in fact complied with the terms of the statute.

V

Summary.

The petitioner did not secure an exclusive right to print, publish, vend, and otherwise make use of the article in question until *after it complied with the provisions of the Copyright Act.* Only after full compliance did there exist the right to insure that exclusiveness—the right to sue for any infringement. By its failure promptly to deposit copies and secure registration as required by the Act it was, as found by the appellate court, barred from suing for any infringement, such as that here involved, which occurred *before* its tardy deposit and registration.

Respectfully submitted,

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December 9, 1938.